IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 1074 OF 2004

Nitin Madhukar Kulkarni ....Appellant.
(Orig.Accd.)

Versus

The State of Maharashtra ....Respondent.

Mr. Ramrao Adik Sr. Adv. With Mr.Sachin Kadam and Suresh M. Sabrad, Advs. for the appellant.

Mrs.U. V. Kejriwal, A.P.P. for the State.

CORAM: V.G. PALSHIKAR
AND
ANOOP V. MOHTA, JJ.

3.11.2004.

ORAL JUDGMENT: (Per Palshikar, J.)

Being aggrieved by the judgment and order of conviction passed by the Additional Sessions Judge, Niphad on 31.8.2004 in Sessions Case No.27/03 sentencing him to suffer life imprisonment and fine of Rs.25,000/- in default to further suffer imprisonment for six months, the appellant has preferred this appeal on the grounds mentioned in the memo of appeal and as verbally canvassed before us.

2. With the assistance of the learned advocate for the appellant and the learned assistant Public Prosecutor we have scrutinized, perused and reappreciated the entire evidence available on record.

3. The prosecution story as disclosed by reappreciation of evidence stated briefly is that one Chaurang P.W. 1 discovered dead body of a woman in his field around 5.00 p.m. On 7.8.2004. He therefore reported his discovery to the police, police recorded his statement and started investigation into the unnatural death at the hands of unknown person. During the course of investigation on 15.8.03 the body was identified by two persons who said that it is the dead body of Shobha Nitin Kulkarni. It further transpired during the course of investigation that the accused and Shobha who is wife were seen together last on 6.8.2004 by couple of witnesses. On the basis of this investigation the police prosecuted the accused for offence under section 302 of Indian Penal Code. The prosecution examined 15 witnesses to prove its case and the learned trial Judge came to the conclusion of guilt and consistent with that conclusion sentenced the accused to suffer imprisonment for life as mentioned above. It is this conviction which is assailed before us by the appellant who is the accused.

4. Shri Ramrao Adik, learned senior counsel appearing on behalf of the appellant-accused in brief made the following submissions:

i) There is no proof that the dead body found on 7.8.2003 was that of Shobha wife of the accused. According to learned counsel absence of corpus delicti or identification of the body conviction under section 302 of Indian Penal Code is not permissible;

ii) assuming that the identification was proper there is no evidence on record to connect accused with the death;

iii) except for P.W. 14 – Dr. Lalchand Jadhav there is no other evidence to show that the death was homicidal.

iv) assuming it to be homicidal death merely because the accused was last seen with the victim on 6th August, it cannot be inferred that he committed the murder somewhere during 10.30 a.m. to 10.30 p.m.;

v) there is no proof of any motive or intention. In the absence of such proof and in the absence of identity of the deceased the conviction is unsustainable in law;

vi) even if the entire evidence of the prosecution is accepted it is grossly inadequate to sustain the conviction of the accused under section 302 of Indian Penal Code.

5. These submissions were countered by the learned additional public prosecutor appearing on behalf of the State by contending that there are three witnesses who have last seen the accused and the deceased together on 6.8.2003. They are P.W. 7 – Mansi Kulkarni, P.W. 8 – Ajay Deshpande and P.W. 10 – Balasaheb Jape. Then there is recovery of weapon, recovery of clothes of the accused and though the panchas in whose presence this recovery was made are hostile, it is liable to be accepted as it is proved by the investigating officer. Medical evidence proves homicidal death and

enmity between the parties was admitted. According to her therefore this was adequate evidence therefore to sustain the conviction.

6. As aforesaid we have reappreciated the entire evidence on record. P.W. 1 – Chaurang More is the person who discovered the dead body on 7.8.2003 and reported the matter to the police. He has proved the report made by him. It was on recording of his statement that the police registered a crime of unnatural death of a woman by unknown persons.

7. P.W. 2 - Bhausaheb More is witness to the panchnama of the spot. He also is a witness to recovery of certain articles belonging to the victim from the spot. All that is proved by his evidence is that a dead body was found in a field and some clothes probably of the victim were found in the field. Then there is deposition of P.W. 3 – Sanjay Kotme who is supposed to be a witness to the panchnama of seizure of certain articles belonging to the accused. However this witness has turned hostile and there is nothing therefore which can be said to have been proved by this witness. He is followed by P.W. 4 – Nitin Bhalkar who was also panch to the panchnama of the dead body and he says that the panchnama was not prepared in his presence. He was declared hostile. There is therefore no evidence to show that the dead body at the time when it was taken possession of was identified by anybody as that belonging to Shobha wife of Nitin. P.w. 5 – Shivnath Bacchav is the Assistant Sub-Inspector who heard the complaint of P.W. 1 and recorded the crime regarding death of woman by unknown persons. His evidence does not lead to anything.

9. Then P.W. 6 – Sunil Jadhav is another panch who was supposed to be witness to recovery of iron rod at the instance of the accused but this witness is also declared hostile. P.w. 7 – Mansi Kulkarni is 7 years old daughter of the victim and the accused who speaks of her mother going away with her father on Wednesday. Her evidence is totally inconsequential.

10. Then relying on evidence of P.W. 8 – Ajay Deshpande is ailing brother of the deceased Shobha. He admits in his deposition that he usually does not leave his house. However he has stated that he saw his sister Shobha going with the accused on 6th August to buy clothes for the children. He therefore went on 9th August to Advocate Jape who was representing wife in the matrimonial dispute between the appellant and the wife to inquire whether the wife Shobha had visited on 9th August and he was informed that she did not attend the Court 8th August. He therefore started searching for his sister. During the course of search he reached Yeola on 15th August where he heard that dead body of female was found and is in the police station. He therefore went to the police station. It is pertinent to note here that body was buried three days after its disclosure and therefore there were only photographs of the dead body in the police station which according to this witness he identified as of his sister Shobha. He also identified clothes seized by the police as those belonging to Shobha. This witness has nowhere stated as to what he was doing from 9th August to 15th August. He is suffering from paralysis of one hand and one leg and usually does not go out, he has still claimed in the Court that he did go out for search of his sister. This evidence unfortunately is belied by P.W. 9 – Ramesh

Aaglawe who also speaks of going to search Shobha but states that Ajay P.W. 8 was not with them. He also is declared hostile. According to him till 15th August he had no knowledge that Shobha was missing.

11. It is pertinent to note here that though the sole identification of the victim is via photographs the prosecution has failed to prove before the Court any photographs. In fact none of the photographs are filed. Photographer is not examined to say that he took those photographs of the dead body found in the field as explained by P.W. 1. Today before the Court therefore there is no material even to observe that the photographs which are exhibited are enough identification of the deceased. In this regard we are constrained to observe that the prosecution was extremely indolent.

12. P.W. 10 – Dalasaheb Jape is the Advocate who represented the victim in the matrimonial dispute. He has stated that on 6th August he saw the accused and the victim going on motorcycle. All the witnesses who have deposed before the Court in relation to their citing the victim and the accused on 6th August have mentioned without fail that the woman was wearing a sari of faint green color (popti rangachi) because that is the one of the recovery from the field and probably only connecting fact. P.w. 11 – Sunil is yet another witness who saw the victim going with the accused on 6th August around noon and says that he went to search for her when she did not come back on the next day also. He however does not mention that the brother of the deceased i.e. Ajay was with the searching party. Two persons of the searching party have been examined before the Court. None of them says that Ajay was there yet Ajay says before the Court that he did

search for Shobha and identified the body. P.Ws. 12 and 13 are panchas who are also hostile. Therefore recovery of iron rod at the instance of the accused is not proved. The only proof being the investigating officer saying that he recovered iron rod at the instance of the accused when the persons in whose presence it was so recovered deny the fact. P.W. 14 – Dr.Lalchand Jadhav proves the homicidal death of the victim. He states that he conducted post mortem and according to him death was caused between 36 to 48 hours prior to the conduct of post mortem. The post mortem was over by 10 a.m. On 8th August. According to this witness therefore death must have occurred between 10.30 a.m. to 10.30 p.m. On 6th August and it is because of this fact that everybody has cited the victim and the accused together on 6th August after 10.30 a.m. It is on the basis of this evidence that the learned trial Judge proceeds to convict the accused under section 302 of IPC. He failed to note that there is no identification of the dead body on record. The failure on the part of the prosecution to examine photographer of the photographs proved on record is a fatal mistake committed by the prosecution. In such circumstances when the only evidence of last seen together on 6th August to connect the accused to the homicidal death is impermissible. Recoveries are not proved, how the death was caused is not proved, who caused death is not proved, when the death was caused is not proved and yet it is presumed that it was the accused who caused the death because he was seen last with the victim on 6th August, by three persons who testified that at that time the woman was wearing a faint green colored sari. In our opinion, the learned trial Judge grossly erred in convicting the accused on such flimsy evidence. In fact it is a case of no evidence. We are therefore unable to sustain the order of conviction. In the result, therefore the appeal succeeds and is allowed. The order of conviction and sentence is set

aside. The accused is acquitted of all the charges leveled against him and presently being in jail is directed to be released forthwith if not otherwise required.